

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1465

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

ANGELO ROCHE, et al.,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

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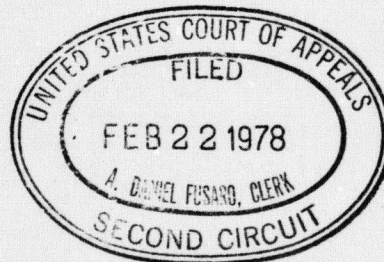


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UNITED STATES OF AMERICA,

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF ISSUES

1. Whether the indictment charged a single conspiracy, while the proof showed a series of smaller ones, resulting in a material variance prejudicial to appellant Angelo Roche and requiring a reversal of his convictions.

2. Whether the inherent unfairness of the mass indictment and resulting subjection of appellant Angelo Roche to "volu-

minous testimony relating to unconnected crimes in which he took no part" requires a reversal of his convictions.

3. Whether the Assistant United States Attorney improperly vouched for the credibility of the Government's witnesses and thereby deprived appellant Angelo Roche of a fair trial.

4. Whether the failure of the District Court to correct the jury's misconception of the evidence, as reflected in a jury note, requires a reversal of appellant Angelo Roche's convictions.

5. Whether the submission of a copy of the indictment to each juror to take into the jury room during deliberations constituted error and requires a reversal of appellant Angelo Roche's convictions.

6. Whether the lack of disparity in the sentences of appellant Angelo Roche and his eight co-defendants-appellants requires a remand for resentencing.

7. Whether any of the points raised in the Briefs of the co-defendants-appellants require a reversal of appellant Angelo Roche's convictions.

STATEMENT OF THE CASE

A. Nature of the Case

Angelo Roche appeals from a judgment of conviction entered on September 23, 1977 in the United States District Court for the Southern District of New York before Honorable Vincent L. Broderick. He was found guilty following a trial by jury of a violation of 21 U.S.C. §846 and 21 U.S.C. §§812, 841(a)(1) & 841(b)(1)(A) (two counts). Judge Broderick sentenced Roche to concurrent terms of imprisonment of fifteen years on each count and placed him on Special Parole for a period of fifteen years to commence upon expiration of his confinement.

B. Proceedings and Disposition in the Lower Court

The indictment named twenty-four defendants and sixteen co-conspirators as participants in various violations of the federal narcotics laws. Count One charged all twenty-four defendants with a conspiracy to violate the narcotics laws. Counts Two through Twenty-nine charged all but three of the indicted individuals with substantive narcotics offenses.

Roche and eight of his co-defendants were jointly tried and found guilty after a six-week trial of the conspiracy and of

one or two substantive counts each. On September 19 and 23 and October 5, 1977 and January 13 and February 2, 1978 sundry concurrent sentences, as noted below,¹ were imposed.

1. The dispositions were as follows:

Defendant	Counts	Imprisonment	Special Parole
1. Domingo Zayas	1 26	15 years 15 years	6 years
2. Orlando Machado	1 23	9 years 9 years	6 years
3. Luis Nunez-Ramos	1 7 18	15 years 15 years 15 years	6 years
4. Carlos Rivera-Santiago	1 18	15 years 15 years	3 years
5. Angelo Roche	1 4 8	15 years 15 years 15 years	15 years
6. Jose Velasquez	1 5 9	15 years 15 years 15 years	6 years
7. Fabian Rodriguez	1 20 22	15 years 15 years 15 years	6 years
8. Antonio Morales	1 15	15 years 15 years	6 years
9. Anthony Rodriguez	1 27	4 years 4 years	6 years

All nine defendants in the lower court are appellants in this proceeding and are filing a joint appendix and separate Briefs ².

STATEMENT OF THE FACTS

The indictment charges a single conspiracy covering the period from October 1, 1973 to November 6, 1975. It lists forty-four overt acts in which every charged defendant is mentioned at least one time. Roche is the subject of acts five and twelve (34A-35A) ³.

The Government presented its case through three indicted co-defendants, three unindicted co-conspirators, and nine law enforcement officials. In addition, the jury heard a bank employee, numerous stipulations and documentary evidence. Various exhibits, including heroin and cash unconnected to Roche, were introduced into evidence.

2. Pursuant to orders of this Court dated October 27, 1977 and December 21, 1977, appellants Fabian Rodriguez and Domingo Zayas, respectively, have been granted leave to dispense with filing a Brief and joint appendix and to adopt verbatim the legal points and arguments of the co-appellants.

3. Citations followed by "A" refer to the joint appendix on appeal.

The trial transcript consists of over 3700 pages.

Three witnesses mentioned Roche, but only one of them described any illegal activity. Among the hundreds of meetings and transactions over a two-year period, Raymond Rivera-Rodriguez testified that he sold Roche heroin four times. In August, 1974, Rivera met Roche, discussed the sale of drugs and delivered one-half of a kilogram of heroin to him (Tr. 243-245, 250-251)⁴. Later that month or sometime in September, 1974 a second sale in the same amount was consummated (Tr. 271-272, 277-278). Finally, the third and fourth sales took place in September and October, 1974, respectively (Tr. 332-334, 335, 392-393). Jose Luis Guzman--a Drug Enforcement Agent--testified that he arrested Roche in Puerto Rico on March 2, 1977. He recognized a car parked in front of Roche's residence as similar to an automobile driven by appellant Jose Velasquez in late 1975 or early 1976. Upon receiving Roche's consent, he searched the vehicle and found papers belonging to Velasquez (Tr. 1697-1714). Juan A. Roman--a Drug Enforcement Agent--testified that Roche was present during a conversation, although he did not speak or otherwise partake therein, that

4. Citations preceded by "Tr." refer to the Minutes of the Trial which commenced on May 23, 1977 and ended on July 1, 1977.

Roman had on June 3, 1974 in a bar with appellant Jose Velasquez concerning the purchase of heroin (Tr. 2468-2471).

Eight defense witnesses testified. Among them were the appellants Domingo Zayas and Carlos Santiago. Only one defense witness and two exhibits concerned Roche. In order to explain the presence of a car outside his home in Puerto Rico and the presence of some papers in it referring to appellant Jose Velasquez,⁵ Roche called Jaime Velasquez to the witness stand (Tr. 2811-2819). To prove his presence in Puerto Rico on August 12, 1974, Roche produced a bill of sale for a house he had purchased there on that date (Tr. 2822-2824, 2881). The bulk of the evidence for both sides had nothing to do with Roche.

The balance of the evidence at trial, while comprising most of the record, concerned itself with the other twenty-three co-defendants and sixteen co-conspirators, but was not connected with Roche. From the mouths of co-conspirators Benito Cruz and Raymond Rivera-Rodriguez, a story of the rise and fall of numerous

5. Persons designated "appellant" refer to the nine defendants who went to trial and are part of this appeal. All other defendants are designated "defendant."

drug traffickers unfolded. For purposes of this appeal many of the details are unnecessary and have been omitted. Since this Court must view the evidence in the light most favorable to the Government when considering a multiple conspiracy claim, the following statement of the facts is a chronological review of the evidence, rather than a separate summary of each witness' testimony. In order to properly consider the facts, it should be remembered that the evidence shows that most of the heroin was brought to New York by couriers, who, in turn obtained it from members of the Valenzuela organization in California. The Government contended in the indictment that these transactions and the subsequent distribution of the contraband were committed by members of the Gallardo organization and their customers (32A-33A).

--In September, 1972--prior to the instant conspiracy--co-conspirator Benito Cruz entered into a partnership with defendant Fernando Gallardo⁶ (Tr. 2036). In December, 1973 Cruz put up the money for Gallardo and George Vasquez to make a trip to Los Angeles and purchase five ounces of heroin (Tr. 2054-2056). Subsequently, Gallardo, defendant Martha Machado, one Vasquez and one Mexico

6. Fernando Gallardo was a fugitive at the time of the trial.

went to Los Angeles and bought a package (nine ounces of heroin) for \$6,000. Gallardo learned the identity of the California connection and made two trips there alone in December, 1973 and January, 1974 (Tr. 2056-2060).

Cruz and Gallardo split up and then rejoined forces in March, 1974 (Tr. 2060-2062). Gallardo gave him heroin to sell and continued to supply him through defendant Pumarejo and one Robert and one Luis Rios. Cruz and appellant Orlando Machado sold some of the heroin to co-conspirators Ramon DeJesus-Cortes and Jose Rivera. Other customers of Cruz were Felito, Carmelo and Luis Vargas (Tr. 2063-2080). Gallardo also introduced Cruz to co-conspirator William Cortes-Rios and appellant Luis Nunez-Ramos (Tr. 2080-2081). Cortes sold him heroin on two occasions (Tr. 2083-2088). By June, 1974 Cruz was still selling heroin, but was no longer involved with Gallardo (Tr. 2091).

Raymond Rivera-Rodriguez testified that he was brought into narcotics trafficking in August, 1974 by William Cortes-Rios and told that Fernando Gallardo was the chief of the organization (Tr. 206-208).

In August, 1974 Rivera and Cortes traveled to Los Angeles

and purchased eleven packages of heroin (Tr. 218-228). Upon returning to New York he met with Gallardo and others and gave one package to defendant Herminio Gutierrez and co-conspirator Francisco Machado (Tr. 231-233). Thereafter, Cortes took him to meet customers in Manhattan. He distributed the heroin to appellants Angelo Roche and Jose Velasquez and defendants Moises Maldonado, Ricardo Tirado, Jose Luis Iglesias ⁷ and Victor Medina and received \$7,000 for himself (Tr. 236-256).

Three or four days later Rivera took his second trip to California and bought fourteen packages of heroin. He met with Iglesias and arranged to dispose of the contraband (Tr. 260-271). It was sold to appellants Roche, Velasquez, Antonio Morales and Nunez-Ramos, defendants Maldonado, Tirado, Ricardo Garcia, Medina and Terson, co-conspirator Francisco Machado and Gilbert and Angelo (brother of Ismael) (Tr. 271-280, 294-311). For his work Rivera earned \$15,000 (Tr. 312-313). Ricardo Garcia testified that he purchased heroin from Iglesias three times in September, 1974 and that Rivera was present on one occasion (Tr.

⁷. Defendant Iglesias' case was severed during the trial (Tr. 293-294). He pleaded guilty and received a five-year sentence.

1280-1285). Louis Rodriguez testified that he purchased heroin seven times in September, 1974 from Rivera and Iglesias (Tr. 1193-1199).

Following his third trip to Los Angeles, Rivera returned to New York with sixteen packages of heroin (Tr. 320-327). He sold it to appellants Orlando Machado, Roche, Velasquez, Nunez-Ramos, Morales and defendants Maldonado, Tirado, Terson and Luis Rodriguez, co-conspirator Francisco Machado and Gilbert and Angelo. This time Rivera was paid \$20,000 for himself (Tr. 329-345).

Rivera came back from his fourth trip to California with ten packages of heroin, which he gave to appellant Carlos Santiago to sell. Rivera made \$5,000 (Tr. 350-355, 368).

At the end of October, 1974 Rivera flew to California for the fifth time. Fernando Gallardo joined him there. They received about thirty-five packages of heroin (Tr. 369-388). Back in New York, Rivera gave two packages to co-conspirator Francisco Machado, as per Gallardo's instructions (Tr. 391-392). Over the next fifteen to twenty days, Rivera sold twenty-eight of the packages to appellants Velasquez, Roche and Nunez-Ramos,

defendants Maldonado, Tirado, Terson, and Luis Rodriguez, co-conspirator Hermenigildo Diaz-Caballero and Gilbert and Angelo (brother of Ismael) (Tr. 392-393).

From February to May, 1975 Rivera testified that appellant Domingo Zayas made trips to California and supplied him with heroin for distribution to customers of the Gallardo organization. In the spring of 1975 he also obtained heroin from defendants Martha Machado, Carlos Gallardo and Pumarejo to sell. He disposed of sixty or seventy packages and returned about half a million dollars to his suppliers (Tr. 419-427).

During the fall of 1974, according to the testimony of co-conspirator Raymond Rossy, he made five purchases of heroin from Fernando Gallardo (Tr. 1310-1325). In the beginning of January, 1975 he attended a meeting with Gallardo and Cruz and was informed that Cruz was taking over. Thereafter, Cruz sold him five or six kilos of heroin during a two-week period and Rossy distributed the same to his customers, including appellants Domingo Zayas and Anthony Rodriguez (Tr. 1328-1334).

Benito Cruz stated that he commenced working for Gallardo on January 5, 1975 for a twelve-day period. He distri-

buted seventeen kilos of heroin worth \$850,000 before he stopped working for Gallardo and started dealing with other people. Among his customers in January, 1975 were appellants Fabian Rodriguez, Anthony Rodriguez and Nunez-Ramos, defendants Gilberto Torres and Medina, and co-conspirators Rossy, De-Jesus Cortes, Diaz-Caballero (Tr. 2122-2132, 2159-2179, 2200-2202).

Benito Cruz, Raymond Rossy and Raymond Valentine continued buying and selling heroin and testified thereto, although they were not associated with Gallardo. Valentine bought heroin four times from Rossy between March and July, 1975 and again in September, 1975 (Tr. 1832-1833). He also obtained heroin from defendant Herminio Gutierrez and one Victor six times in August, 1975. On one occasion appellant Anthony Rodriguez delivered it. After the fourth purchase Valentine spoke with Gallardo and got the price lowered (Tr. 1833-1853).

Rossy, in turn, learned at the end of February or the beginning of March, 1975, that Cruz was not working for Gallardo and started buying heroin from him and co-conspirator Jose Rivera every week (Tr. 1341-1344). Rossy and Cruz also dealt with the same connection in California as Gallardo had used (Tr. 1344-1353).

2202-2205).

Subsequently, Cruz and Rossy made several sales of heroin to Jose Guzman--a D.E.A. Agent who testified at trial. Following their arrests in late 1975, Rossy went to California and led the police to his heroin source and twenty kilos of heroin there (Tr. 1354-1355, 1357-1361, 1565-1588, 2208-2210, 2213-2222).

The balance of the testimony came from police officers and generally covered the arrests and searches of various defendants and co-conspirators and some undercover purchases of narcotics.

ARGUMENT

POINT ONE

THE INDICTMENT CHARGED A SINGLE CONSPIRACY WHILE THE PROOF SHOWED A SERIES OF SMALLER ONES, RESULTING IN A MATERIAL VARIANCE PREJUDICIAL TO APPELLANT ANGELO ROCHE AND REQUIRING A REVERSAL OF HIS CONVICTIONS.

The proof at trial revealed several independent and separate conspiracies, rather than the single conspiracy averred in the indictment. Where such a variance results in prejudice to the accused--the claim set forth herein by Roche--a reversal of the conviction is mandated (Kotteakos v. United States, 328 U.S. 750 [1946]).

Viewing the evidence in the light most favorable to the Government, the first conspiracy began in December, 1973 when Benito Cruz financed Fernando Gallardo and ended when they split up in January, 1974. In March of that year Cruz again turned to Gallardo for his source of drugs and became part of his operation. This second conspiracy, too, was short-lived and ended by June, 1974, by which time Cruz' drug activities no longer involved Gallardo.

Chronologically, the third and first of two larger conspiracies commenced in August 1974 when Raymond Rivera-Rodriguez made his first trip to California for Fernando Gallardo. From that time until November, 1974 he traveled to California five times and brought back and distributed a total of eighty-five packs (nine-ounce packages of heroin). Roche was one of his purchasers. Rivera's partner and major assistant in disposing of the narcotics was Jose Luis Iglesias, who is otherwise unmentioned in the trial testimony.

Rivera's involvement with Fernando Gallardo continued during the spring of 1975. Domingo Zayas, Martha Machado, Carlos Gallardo and Pumarejo supplied him with sixty or seventy packs which he sold.

The fourth conspiracy, although short in duration, was major in scope and centered about the twelve-day distribution of seventeen kilos of heroin for \$850,000 by Cruz. It cannot be seriously contended that Cruz replaced Rivera, for they had none of the same customers. Only Raymond Rossy both bought drugs from Cruz and had previously been a Gallardo, although not a Rivera, customer.

Rossy, in turn, sold to people otherwise unconnected with Cruz or Rivera.

These four conspiracies are the chain conspiracy type familiar to this Court. A fifth wheel conspiracy can be carved from the testimony of Rivera which shows him and Iglesias to be New York distributors and Roche, as a customer, the end of one of the spokes on the wheel.

Much additional testimony elicited at trial involved the drug dealings of Cruz and Rossy outside the Gallardo organization. Also DEA agents testified about their involvement with the various defendants and co-conspirators. For example, Jose Guzman, Raphael Rivera and Juan Roman made five, three and seven undercover purchases of narcotics, respectively; numerous search warrants and arrests of the defendants and conspirators resulted in the seizure of large amounts of drugs and cash; and the arrest of the California connection in November, 1975 included a seizure of twenty kilos of heroin. Finally, Raymond Valentine testified about his drug purchases, including six transactions in August, 1975 from intermediaries of Fernando Gallardo.

The basis for finding at least four separate conspiracies

consists of the lack of evidence to show that Roche was aware of any of the activities of the other conspiracies; the different time periods involved; and the inconsistent identities of the vast majority of the participants in the respective conspiracies. The slight link at the top among the conspiracies of an often common source in California and the influence of Fernando Gallardo cannot justify a single indictment of the twenty-four defendants naming sixteen co-conspirators (United States v. Sperling, 506 F.2d 1323, 1340-1341 [2d Cir. 1974], cert. den. 420 U.S. 962 [1974], 421 U.S. 949 [1975]).

At the close of the Government's case Roche's trial attorney preserved the multiple conspiracy issue by moving to dismiss the indictment on that ground. The District Court denied the application (Tr. 2891-2894). Appellant Roche recognizes the frequency with which this claim is raised and the relative ease in asserting the same (United States v. Moten, 564 F.2d 620, 624 [2d Cir. 1977]; United States v. Magnano, 543 F.2d 431, 433 [2d Cir. 1976]; United States v. Sperling, supra at 1340]), but urges this Court to seriously consider the argument and notes that success on appeal, although rare, is not unheard of (United States

v. Bertolotti, 529 F.2d 149 [2d Cir. 1975]; United States v. Johnson, 515 F.2d 730 [7th Cir. 1975]; United States v. Butler, 494 F.2d 1246 [10th Cir. 1974]; United States v. Varelli, 407 F.2d 735 [7th Cir. 1969]).

This Circuit has often observed that in the world of drugs "the suppliers know that the business does not end with their sale to the middlemen, and the distributors know from the vast amounts purchased and its ready availability that their seller has a source of supply" (United States v. Moten, *supra* at 624-625; see United States v. Taylor, 562 F.2d 1345, 1352 [2d Cir. 1977]; United States v. Lam Lek Chong, 544 F.2d 58, 65-66 [2d Cir. 1976]; United States v. Magnano, *supra* at 433-434; United States v. Ortega-Alvarez, 506 F.2d 455, 457 [2d Cir. 1974], *cert. den.* 421 U.S. 910 [1975]; United States v. Bynum, 485 F.2d 490, 495-496 [2d Cir. 1973], *vacated and remanded on other grounds*, 417 U.S. 903 [1974]). While it cannot be denied that a purchaser of one-half kilogram of heroin on four occasions must have some idea that his supplier's business extends beyond him, it cannot be presumed that he envisions it to extend to the proportions of the "single" conspiracy alleged here. Roche was named in two

of forty-four overt acts and two of twenty-eight substantive counts ⁸. Of the twenty-three co-defendants and sixteen co-conspirators, only appellant Velasquez and co-conspirator Rivera are linked to Roche. Benito Cruz never met him. None of the other cooperating witnesses mentioned him.

The separate trial of the charges against Roche and those persons connected with the Rivera conspiracy would not have subjected the Government to substantially more work or a greater number of days on trial. The main witnesses of Benito Cruz and Raymond Rivera-Rodriguez were generally not needed to testify against the same defendants. Each co-conspirator avoided prosecution by testifying against some of his buyers. Ironically, none of their suppliers were on trial. Rivera implicated appellants Zayas, Machado, Nunez-Ramos, Rivera-Santiago, Roche, Velasquez and Morales. Cruz named appellants Machado, F. Rodriguez and A. Rodriguez as his confederates in the drug business.

⁸. Overt acts 5 and 12 accused Roche of receiving heroin and counts 4 and 8 accused him of possessing it with the intent to distribute the same.

The Court below quite properly submitted the single conspiracy question to the jury (551A-553A). However, it prejudiced Roche in declining to marshal the evidence, because the proof against him was not overwhelming.

Of course, establishment of a variance "does not automatically require reversal" (United States v. Miley, 513 F.2d 1191, 1207 [2d Cir.], cert. den. 423 U.S. 842 [1975]). The test "is whether the variance affects substantial rights" (United States v. Aquerci, 310 F.2d 817, 827 [2d Cir. 1962], cert. den. 372 U.S. 959 [1963]). For the reasons advanced under Point Two, infra, Roche submits that the variance mandates reversal.

POINT TWO

THE INHERENT UNFAIRNESS OF THE MAS INDICTMENT AND RESULTING SUBJECTION OF APPELLANT ANGELO ROCHE TO "VOLUMINOUS TESTIMONY RELATING TO UNCONNECTED CRIMES IN WHICH HE TOOK NO PART" REQUIRES A REVERSAL OF HIS CONVICTIONS.

This Court recently noted the serious nature of the argument that a massive trial involving multiple defendants and lasting many weeks makes it "virtually impossible to expect the jury to recognize the limitations of evidence to certain defendants" in United States v. Moten (supra at 626). That case involved a 9500-page record. However, twelve of the thirteen appellants in Moten were distributors involved in the conspiracy at least for "substantial periods of years" (id. at 625).

Here, Roche's activities were limited in number and terminated in less than three months. He was named in three of twenty-nine counts, two of forty-four overt acts and linked to but one defendant and one co-conspirator. During the six-week trial, day after day, the jury deciding his fate heard "dozens of incidents of criminal misconduct" not involving Roche (United States v. Branker, 395 F.2d 881, 888 [2d Cir. 1968], cert. den.

393 U.S. 1029 [1969]; see United States v. Bertolotti, supra at 157). The jury saw huge amounts of drugs and piles of cash not even remotely connected to Roche. As the record reveals, Roche's attorney had little to combat and participated sparingly at trial, because most of the proceedings had nothing to do with him. If the evidence compiled against Roche during the six-week trial were sifted from the 3700-page transcript, it could easily have been presented in less than one day. Instead, Roche had to sit through and get swallowed up in testimony concerning hundreds of drug transactions and related activities over a two-year period, not to mention various drug business conducted by some co-defendants at trial, notably Velasquez and Fabian Rodriguez, prior to the conspiracy.

Unlike the situation in United States v. Miley (supra at 1209), the trial was six weeks, rather than five days, and nine out of twenty-four defendants and sixteen co-conspirators, instead of five out of nine persons indicted, were tried.

Moreover, no outward sign that the jury was able to differentiate among the defendants is found in the verdicts. All nine defendants were convicted of all charges against them (see

United States v. Moten, supra at 627). The jury note requesting the testimony about the finding of heroin upon seven of the defendants on trial at the time of their arrests--a concededly fictitious event--reflects general confusion and the prejudicial spillover effect of the joint trial (Tr. 3622-3640) (see Point four, infra).

Also, in contrast to the Moten case (supra at 627) where none of the appellants testified in his own behalf, counsel for the various defendants did not provide a coordinated defense. For example, Zayas testified and denied making the heroin sales charged (Tr. 2685-2688); Carlos Santiago testified and called two witnesses to assert an alibi defense (Tr. 2728-2733, 2748-2752, 2753-2767); Velasquez and Roche presented alibi defenses without taking the witness stand (Tr. 2794-2805, 2811-2819, 2822-2824, 2881); and Anthony Rodriguez called upon his brother to show that he was a drug addict and incapable of forming the specific intent required by the relevant statutes (Tr. 2825-2841). The antagonistic nature of these defenses becomes clear when it is considered that Rodriguez, in effect, conceded his involvement with drugs and, thereby, enhanced the credibility of

the Government's witnesses. In addition, the jury's rejection of any of the other defenses advanced could easily have led to a dismissal of the co-defendants' claims as part and parcel of the same attack upon Raymond Rivera-Rodriguez--the chief witness. Finally, it should be noted that defense counsel could not even agree on the order of summation (Tr. 2983-2989).

In sum, Roche was categorized as a middleman in the drug business whose brief involvement with a distributor-courier was buried in an avalanche of damaging, unrelated testimony and exhibits of the drug activities of other people.

States v. Burse, 531 F.2d 1151, 1154-1155 [2d Cir. 1976]; United States v. Puco, 436 F.2d 761, 762 [2d Cir], rev'd and remanded 453 F.2d 539 [1971], aff'd 476 F.2d 1099, cert. den. 414 U.S. 844 [1973]). In the same vein, it is improper "to put the prestige of the United States Attorney's Office behind the Government's case" (United States v. Brawer, 482 F.2d 117, 134 [2d Cir.], on remand 367 F. Supp. 156 [S.D.N.Y. 1973], aff'd 496 F.2d 703, cert. den. 419 U.S. 1051 [1974]; United States v. LaSorsa, 480 F.2d 522, 526 [2d Cir], cert. den. 414 U.S. 855 [1973]; United States v. Benter, 457 F.2d 1174, 1176 [2d Cir.],

POINT THREE

THE ASSISTANT UNITED STATES ATTORNEY IMPROPERLY
VOUCHED FOR THE CREDIBILITY OF THE GOVERNMENT'S WITNESSES
AND THEREBY DEPRIVED APPELLANT ANGELO ROCHE OF A FAIR TRIAL.

It is improper for the prosecutor to inject himself
into the proceedings and thus become an unsworn witness. He
cannot suggest that he possesses evidence or knowledge that a
defendant is guilty or otherwise put his own integrity in issue
(Berger v. United States, 295 U.S. 78, 88-89 [1935]; United
States v. Farnkoff, 535 F.2d 661, 668 [1st Cir. 1976]; United

cert. den. 409 U.S. 842 [1972]).

In the case at bar the prosecutor commented in his rebuttal summation as follows:

"But perhaps more fundamental to the charge that the government in this case has put the suggestion into the government's witnesses whom they should testify against, that somehow an agent of the federal government has decided that he will try and obtain the conviction of innocent people by putting the names of innocent people into the mouths of government witnesses, if you think that I, if you think that Mr. Ziegler or any other federal agent would jeopardize his or her career beyond a reasonable doubt to convict these people by doing such a thing, then take about 30 seconds in your deliberations;

if you think that is what happened here, come back in 30 seconds and acquit every one of them; if that is what this case is about and you think that is what this case is about, you have no business taking any more time than 30 seconds" (419A).

All counsel joined in a motion for a mistrial based upon these remarks. The District Court heard arguments, denied the motion and agreed to give curative instructions in its charge the next day (445A-448A, 452A-465A, 471A-473A).

The quoted passage dually prejudiced the defense. Firstly, when coupled with previous statements that Roche's attorney in his summation "raised the innuendo" that Rivera had

been fed names and "programmed with these names and told 'You'll testify about these people,'" although he never knew them (416A-417A), it unfairly characterized defense arguments as an accusation that the federal government was framing an innocent man. Secondly, it told the jury that the two young clean-cut prosecutors stood behind and vouched for the credibility of the criminals who cooperated with the Government in a successful effort to extricate themselves. An examination of the summation given for Roche dispels any legitimacy to the claim that the prosecutor was properly responding to defense arguments, as advanced in the lower court (455A-456A, 471A-472A).

Three pieces of evidence concerned Roche at trial. The testimony of Rivera attributed purchases of heroin to Roche. The testimony of DEA agent Jose Luis Guzman connected Roche to a car containing innocuous papers belonging to appellant Jose Velasquez. The testimony of DEA agent Juan A. Roman placed Roche in a bar and present during a conversation between the agent and Velasquez about narcotics. In his summation defense counsel outlined these three topics and then dealt with them in order (709A-710A). Rivera was vigorously attacked as a liar. Upon his credibility Roche's

fate rested and counsel attempted to show him to be unworthy of belief (710A-718A). However, the treatment of the agents' testimony was markedly different. Instead of seeking to discredit the same, counsel explained it as consistent with innocence, rather than guilt. At no time did counsel suggest that Guzman or Roman had committed perjury (718A-727A).

Following the above arguments, the defense offered an explanation as to how Rivera might have learned of Roche's name. Counsel posed an imaginary scene and described one of the possible interviews involving the debriefing of Rivera. Naturally, the agents would inquire whether Rivera knew people whom they suspected of narcotics activity. Counsel intimated that upon learning that Roche had been present during a drug conversation between an agent and Velasquez--with whom Rivera had had narcotics dealings--Rivera seized upon the name as another person whom he could give up to save himself (727A-730A). The scenario did not even hint at governmental impropriety. In fact, to do so would be to go against the grain and theme of the closing argument that Roche was the victim of a lying informant and mistaken beliefs on the part of the detectives formed by Roche's being at the wrong places

at the wrong times.

With this background in mind it becomes clear that the prosecutor incorrectly told the jury that defense counsel accused the police of trying to convict an innocent man. Next, he compounded the error by putting the integrity of the prosecution team and the Government in issue. In effect he instructed the jury: if you like me and believe me, you can accept my witnesses; I believe them and you should, too; I have risked my career, if I have given you witnesses whom I think lied. Significantly, at the conclusion of Roche's closing arguments, no complaint was voiced that the office of the United States Attorney had been denigrated and no curative instructions thereon were requested.

From these facts, it is submitted, this case falls within the holding of United States v. Grunberger (431 F.2d 1062, 1068 [2d Cir. 1970]), wherein it was noted that the prosecutor's statements were "not merely an averment of a personal belief. . . based on the evidence adduced at . . . trial." The prosecutor cannot tell the jury that he thinks the defendant is guilty (United States v. Farnkoff, supra). Here, the added factor exists that all counsel were specifi-

cally warned immediately prior to the closing arguments not to vouch for the credibility of witnesses (Tr. 2991-2992).

Furthermore, it must be emphasized that the defense attack upon the Government's witnesses, no matter how broadly it may be construed, did not impugn the integrity of the prosecutor's office. Therefore, it cannot be argued that these disputed comments constituted a proper response (see United States v. Tramunti, 513 F.2d 1087, 1118-1119 [2d Cir.], cert. den. 423 U.S. 832 [1975]; United States v. Brawer, supra; United States v. LaSorsa, supra; United States v. Benter, supra; United States v. Kiame, 258 F.2d 924, 934 [2d Cir. 1958]).

The District Court acknowledged that even if the prosecutor had not included himself "in those whose representations might be jeopardized, . . . it was still putting the whole credibility of the United States Government behind these witnesses" (472A). Accordingly, it gave instructions to the jury to the effect that attorneys do not vouch for their witnesses (533A-534A). For a number of reasons these remarks could not rectify the situation.

No instructions could remedy this egregious error or

sufficiently reverse its impact upon the jury. Anything the judge said could not change the impression left by the young and eager prosecutors that they would not put on an untruthful witness and thereby jeopardize their careers. Of course, here the only issue with respect to Roche was Rivera's credibility. Moreover, because of the judge's policy at trial, defense counsel were barred from interrupting the rebuttal summation and, perhaps, limiting the effect of the error by nipping it in the bud. A specific request to alter this system solely for the prosecutor's rejoinder was denied (389A-390A). When the court finally dealt with the subject, it was in the second part of its charge given after 2:00 P.M. on the following day. Coming as they did almost twenty-four hours later and as a small part of the charge which consumed over one hundred pages of transcript (502A-608A), the instructions were too late and lost in the plethora of important advice they accompanied.

In sum, the sole cure for the prosecutor's improper remarks remains a new trial.

POINT FOUR

THE FAILURE OF THE DISTRICT COURT TO CORRECT THE JURY'S MISCONCEPTION OF THE EVIDENCE, AS REFLECTED IN A JURY NOTE, REQUIRES A REVERSAL OF APPELLANT ANGELO ROCHE'S CONVICTIONS.

During the course of its deliberations the jury requested "Testimony of undercover agents who found heroin on seven of the defendants, not except Angelo, The Old Man, and from whom agents bought heroin" (Tr. 3622-3623). "Angelo the Old Man" refers to appellant Angelo Roche who was designated in the indictment "a/k/a The Old Man." All trial counsel were concerned with this note, since none of the defendants at trial possessed heroin when arrested on this case. Requests to correct the jury's mistake as to the facts were denied after lengthy discussion (Tr. 3622-3640).

The decision to read back testimony is discretionary and rests within the trial judge's power and duty to run the proceedings (United States v. Gentile, 525 F.2d 252, 261 [2d Cir. 1975], cert. den. 425 U.S. 903 [1976]; United States v. Pollak, 474 F.2d 828, 832 [2d Cir.]; on remand 364 F. Supp. 1047 [E.D.N.Y.

1973], aff'd 492 F.2d 1237 [1974]; United States v. McCarthy, 473 F.2d 300, 308 [2d Cir. 1972]). In addition, the trial judge is responsible, where confusion and misunderstanding are reflected in communications from the jury, to address these problems and "clear them away with concrete accuracy" (Bollenbach v. United States, 326 U.S. 607, 612-613 [1946]; United States v. Bolden, 514 F.2d 1301, 1309 [D.C. Cir. 1975]). The proper procedure in the instant matter would have been to inform the jury that no testimony concerning the recovery of narcotics as described in the jury note appears in the testimony and that the court awaits a clarification of the request. Where a jury note is ambiguous or incomprehensible, the judge must read it in open court and seek to resolve the discrepancy. It cannot be argued that leaving this confusion unresolved constituted harmless error (see United States v. Schor, 418 F.2d 26, 29-30 [2d Cir. 1969]).

POINT FIVE

THE SUBMISSION OF A COPY OF THE INDICTMENT TO EACH JUROR TO TAKE INTO THE JURY ROOM DURING DELIBERATIONS CONSTITUTED ERROR AND REQUIRES A REVERSAL OF APPELLANT ANGELO ROCHE'S CONVICTIONS.

A copy of the indictment was distributed to each member of the jury to enable him or her to follow along as the judge went over it during his instructions (536A). Although the substantive counts pertaining to defendants not on trial were deleted (390A-391A), in spite of a defense objection, the forty-four overt acts listed in the first count were retained (Tr. 2902-2903). Near the conclusion of the charge, the trial judge notified the jury that it could utilize its copies of the indictment in the jury room (603A). This error was not cured by the usual cautionary instructions that an indictment is not evidence (511A-512A).

In United States v. Marquez (424 F.2d 236, 240 [2d Cir.], cert. den. 400 U.S. 828 [1970]), this Court upheld the submission of an indictment to the jury upon its request for the same. However, in a more recent case the Court specifically mentioned that

"we are neither asked to decide, nor do we express, any view as to whether the jury is to inspect an indictment in any or all criminal prosecutions" (United States v. Cirami, 510 F.2d 69, 74 [2d Cir.], cert. den. 421 U.S. 964 [1975]).

Since the indictment is not evidence, it should not be included among the exhibits the jury examines in reaching its verdict. In the present case, the overt acts were a summary of the Government's case and amounted to letting the jury read the prosecutor's summation or a synopsis of the direct examination without benefit of the discrepancies and shortcomings elicited on cross-examination. The psychological effect upon a juror of having the indictment before him and the opportunity for him to digest it with the additional sense of sight unavoidably attribute unfounded significance to the accusation.

In sum, the indictment in the jury room served to prejudice Roche and fairly aided the jury no more than the verdict sheet listing the counts would have done.

POINT SIX

THE LACK OF DISPARITY IN THE SENTENCES OF APPELLANT ANGELO ROCHE AND HIS EIGHT CO-DEFENDANTS-APPELLANTS REQUIRES A REMAND FOR RESENTENCING.

Seven of the defendants at trial were sentenced to concurrent terms of imprisonment of fifteen years on the conspiracy and the respective substantive counts of which they were convicted (see footnote one, supra at p.4). The sentences of the remaining two defendants were deferred, pending a study pursuant to 18 U.S.C. 4205(d). Subsequently, the court sentenced Anthony Rodriguez and Orlando Machado--both drug addicts--to four-year and nine-year, concurrent sentences, respectively, on each count.

The uniformity of the sentences imposed upon the seven defendants whose sentences were not put off for further study violates the right of each defendant to be afforded individual consideration. The lack of fairness is more apparent when it is considered that Jose Luis Iglesias--a Key man intimately and deeply involved in the conspiracy--pleaded guilty at the commencement of the trial and was sentenced to a five-year period of incarceration.

POINT SEVEN

THE POINTS PRESENTED BY THE CO-DEFENDANTS-APPELLANTS OF APPELLANT ANGELO ROCHE IN THEIR BRIEFS SHOULD BE DEEMED TO HAVE BEEN RAISED BY ROCHE.

Although Roche opted to submit a separate brief, he wishes to join in any arguments and issues raised by his co-defendants-appellants in their briefs.

CONCLUSION

The convictions of appellant Angelo Roche should be reversed and a new trial ordered or, in the alternative, the case should be remanded for resentencing.

Respectfully submitted,

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OF COUNSEL

RONALD D. DEGEN

AFFIDAVIT OF PERSONAL SERVICE

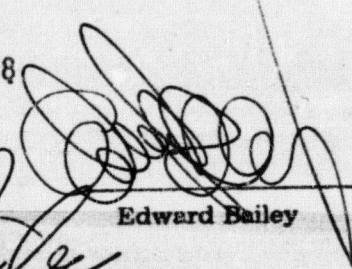
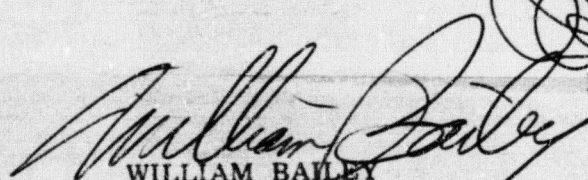
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 22 day of Feb., 1978 at No. 1 St. Andrews Pl., NYC

deponent served the within Brief
upon U.S. Atty. So. Dist. of NY

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
22 day of Feb. 1978


Edward Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

